UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026-reg

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In the Matter of:

MOTORS LIQUIDATION COMPANY, ET AL.,

F/K/A GENERAL MOTORS CORP., ET AL.,

Debtors.

- -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

February 9, 2011

9:51 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

Debtors' 110th Omnibus Objection to Claims (Contingent Co-Liability Claims)

Debtors' 134th Omnibus Objection to Claims (Eurobond Deutsche Debt Claims)

Debtors' 136th Omnibus Objection to Claims (Eurobond Deutsche Debt Claims)

Debtors' 137th Omnibus Objection to Claims (Eurobond Deutsche Debt Claims)

Debtors' 138th Omnibus Objection to Claims (Eurobond Deutsche Debt Claims)

Debtors' 139th Omnibus Objection to Claims (Eurobond Deutsche Debt Claims)

Debtors' 140th Omnibus Objection to Claims (Eurobond Deutsche Debt Claims)

Debtors' 141st Omnibus Objection to Claims (Eurobond Deutsche Debt Claims))

Debtors' 142nd Omnibus Objection to Claims (Eurobond Deutsche Debt Claims)

Debtors' 143rd Omnibus Objection to Claims (Eurobond Deutsche Debt Claims)

Debtors' 144th Omnibus Objection to Claims (Eurobond Deutsche Debt Claims))

Debtors' 145th Omnibus Objection to Claims (Eurobond Deutsche Debt Claims)

TPC Lenders Motion for an Entry of an Order (I) Initiating Valuation Proceedings in Accordance with the Sale Order, and (II) Establishing a Schedule with Respect to the Valuation Proceedings

(Adv. Proc. No. 1-10-05016) New United Motors Manufacturing, Inc. v. Motors Liquidation Company {Pretrial Conference)

Motion to Dismiss Adv. Case 10-5015 & 10-5016

Hearing on Debtors' Objection to Proof of Claim #67357 of New United Motor Manufacturing, Inc.

Transcribed By: Ellen S. Kolman

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Good morning. Be seated, please.

All right. We're here on GM Motors Liquidation. I want to start with the NUMMI matter. I want to get appearances and then I want everybody to sit down because I have some preliminary comments.

MR. SMOLINSKY: Good morning, Your Honor. Joe Smolinsky of Weil Gotshal Manges for the debtors. I just stood to introduce my colleague, Anthony Albanese, who I think you've met once before who will be handling this matter.

THE COURT: Yes. Was it Global Crossing?

MR. ALBANESE: Yes. That's right. Global Crossing years ago.

THE COURT: Yes. I remember, Mr. Albanese.

MR. MCKANE: Good morning, Your Honor. Mark McKane of Kirkland & Ellis on behalf of NUMMI and with me is my partner Ray Schrock.

THE COURT: Right. I'm sorry, Mr. McKane, you partner's name?

MR. MCKANE: Mr. Schrock. Ray Schrock, Your Honor.

THE COURT: Oh, yes. I see him as the other name on the brief, right.

MR. SOBLE: Your Honor, Jeff Soble on behalf of Toyota Motor Corporation or TMC from Foley & Lardner and I'm the only

one alone today.

THE COURT: All right. You're going to have to do it by yourself, huh, Mr. Soble? All right. I see you on your brief as well.

All right, gentlemen, make your presentations as you see fit and since I'm not an appellate court you can address my questions and concerns at any time as long as you've covered them by the time you're done. But I do have a number of problems and concerns with both of your positions and I want you to address them as we go along.

Starting with the 1983 Memorandum of Understanding, and one thing I'm going to ask of you guys either as a point of personal privilege so I can do my job or as a matter of just basic communication, please don't use acronyms except on the most obvious things. If you're talking about the FCC, I understand what that is. But when people use acronyms for less obvious things it makes a judge go blind.

Turning first to the 1983 Memorandum of Understanding, as so many letters of intent and memoranda of understanding are, it is a little squishy in terms of the degree of specificity upon which emerges different things of intent, precatory words, and actual contractual obligations. And then in a paragraph that none of you seem to rely upon, and perhaps that's because you know more about the case than I do, toward the end it seems to say that many of the things in it don't

become effective until some later time such as when governments approve things and things like that. And both sides seem to assume that it was a full binding agreement and I would like you to tell me, it doesn't appear in the pleadings unless I missed it, as to whether there was a time at which what seemingly or tentative and preliminary thoughts blossomed into more concrete obligations. But both sides seemed to my understanding to assume that the 1983 Memorandum of Understanding is a binding agreement vis-a-vis whatever it says but I want you to help me if my understanding in that respect isn't correct.

My principal interest is in the 1984 Vehicle Supply Agreement and I want both sides to address what is my biggest concern, probably the whole day, on the tension between three sentences in 4.1 of that agreement because they head in dramatically different directions and each of you, and I mean no disrespect, I used to be a lawyer, I was an advocate for a client, but each of you relies on a sentence or pairs of sentence that you care about and you ignore the others. And somehow, I as a judge, have to read together seemingly inconsistent language.

Now, one or both of you, I guess it was principally NUMMI, perhaps Toyota made the same point, spoke about canons against surplusage and giving every clause meaning. I think each of you violated that rule. And my job is to give due

respect to that principle and that cuts against each of you, vis-a-vis the language in that 4.1(b) that's inconsistent.

I also am nervous about GM's position when taken to its logical extreme because it would seemingly make all obligations illusory and I think it was Toyota that made the point in its brief. It asked rhetorically could it be that GM had made no promises whatever and didn't have to buy a single vehicle. That strikes me as counter intuitive. Conversely, it seems to me that this dispute may ultimately, perhaps not on a 12(b)(6), but ultimately turn on good faith and could cause me to wonder whether while GM had some obligations, it wasn't required to do anything that forces -- imposed upon it, such as the discontinuation of the Pontiac line and the Pontiac Vibe and the pressure from the U.S. Government wouldn't contemplate.

I do have material problems, Mr. Albanese, with the heavy reliance you put in your motion to dismiss on stuff that was outside the four corners of the complaint. And while the Federal Rules of Evidence to which you relied allows stuff to go in at trial in some cases by reason of judicial notice, I don't know if that's the same thing as turning a 12(b)(6) into a please consider all the other facts. Obviously, I'm allowed to consider everything in the documents but when we go beyond that, I have reservations.

I have major problems, much more major problems with the Toyota claims in at least two respects. One, on the major

contractual obligations, it appears to me, subject to your rights to be heard, of course, that Toyota is a signatory to most or all of the key documents. But the obligations run to NUMMI. They don't run to Toyota. Toyota is a co-shareholder. And I have trouble seeing how Toyota in contrast to NUMMI can complain of contractual obligations except insofar as there is the stated violation of a contractual obligation that runs to Toyota in contrast to NUMMI.

I also have problems of two types with respect to the environmental and workers' comp indemnity claims. The first is the obvious one that the GM estate already articulated which is the failure to allege amounts that we're expending or insofar as I can tell assuming that it would be actionable even though -- which have not been expended but which Toyota is on the hook for.

The second and it puzzled me as to why GM didn't raise this especially on the environmental side, the obligations seem to walk and talk and quack a lot like the CERCLA obligations with respect to which I dismissed claims for indemnification by PRPs, potentially responsible parties, in two recent published decisions in Lyondell Chemical and Chemtura on 502(e) grounds and other than the fact that Toyota might not have spent anything, which if it had spent it wouldn't be a subject to attack under 502(e), I have trouble seeing why those claims aren't also disallowed under 502(e) but I'm also puzzled as to

why GM, which has some pretty good lawyers on it, didn't raise that point. So, maybe I'm just missing something. But when multiple parties are jointly liable to the State of California or to the U.S. government for cleaning up polluted property, I have some trouble divorcing 502(e) from my analysis. So, I want both sides to help me on that issue.

Okay, with that said, I'll hear argument in the traditional order. First from you, Mr. Albanese, then I'll hear from your two opponents, then I'll allow you to reply. And so long as it's appropriately limited I'll permit surreply as well. Want to come on up to the main lectern please?

MR. ALBANESE: Thank you, Your Honor. I'm just gathering some things.

Good morning again, Your Honor.

THE COURT: Good morning.

MR. ALBANESE: Well, in light of Your Honor's comments, I'll keep my presentation very focused on the issues that you've raised, Your Honor. And -- but as you know, our MLC's overall argument here is that -- and I'm going to start primarily with NUMMI's claims and Toyota overlaps with some of their arguments and then at the end I'll go to the separate Toyota claims that you mentioned. But with respect to NUMMI's main arguments, we believe the contracts are very clear in and of themselves that MLC did not have the contractual obligations that NUMMI claims that we had and claims that we violated. We

don't think you need to go beyond the four corners of a contract so for purposes of this presentation, we will -- I will focus on the contracts and I'd like to start with the VSA, the Vehicle Supply Agreement, which Your Honor referenced and in particular section 4.1.

Now, I understand what Your Honor is pointing out that, you know, we each focus on three separate sentences within the same provision and Your Honor's question is whether or not they are, in fact, contradictory. And we don't think they are and we'd like to focus on this entire provision 4.1(b).

The first sentence reads, "The parties hereto are establishing supply and purchase arrangements under which the JB Company shall supply and GM shall purchase the products on a continuous and stable basis." And that's what NUMMI focuses on for its argument that continuous and stable basis means it goes on indefinitely and we have this obligation to continuously purchase vehicles from them. But the provision goes on and it says, "It is acknowledged that the JB Company is making substantial amounts of capital expenditures in its facilities relying upon GM's present projection that market demand for the vehicles will exceed 200,000 units per annum." Now, just to refresh Your Honor, this agreement was from February 1984. So, this paragraph is referencing GM's projections in '84; over twenty years ago.

And then the last sentence says, "However, it is further acknowledged that market demand for the products that could be generated in the areas in which GM expects to sell them will govern the purchase commitments of the parties as to all products." So, that makes very clear that market demand will govern the purchase commitments. And so the reason we don't think it's inconsistent is the way it's drafted. It says that "GM will purchase on a continuous and stable basis, however," it uses the language however, it's qualifying that language, "however, it is further acknowledged", again, further qualifiers, "that market demand will govern." So, again, we don't think the two sentences are inconsistent. We're not attempting to ignore the first one. Yes, there was this -- this language, this effort that we would buy on a continuous and stable basis but only to the extent that market demand allow for it and would govern.

THE COURT: Pause, please, Mr. Albanese.

MR. ALBANESE: Sure.

THE COURT: Is your point that the first sentence of 4.1 which precedes the continuous and stable basis business with "The parties hereto are establishing supply and purchase arrangements" is in substance describing something that is being done elsewhere as contrasted to establishing covenants of its own?

MR. ALBANESE: Yes, Your Honor. We -- first of all,

I'm saying it's qualified but a latter sense then yes because the VSA makes clear that if you turn to Section 4.2, Your Honor --

THE COURT: Yes. Which begins "Within the general principal set forth in Section 4.1 hereof."

MR. ALBANESE: Yes. Correct. "Within the general principals set forth in Section 4.1 hereof, each purchase and sale transaction between the JB Company and GM shall be governed by an individual sales contract. It being agreed that within the context -- within that context that the JB Company has no obligation to supply and GM has no obligation to purchase any products until the parties enter into a contract." So, we think the contract is very clear. It's saying you'll purchase on a continuous and stable basis, however, we're acknowledging that market demand will govern and we're crystal clear that any purchase will not be done pursuant to this VSA but pursuant to a separate sales contract and that you have no obligation to purchase if and until you enter into such a contract, meaning a separate sales contract.

So, we think 4.1 and 4.2 read together in their entirety are very clear as to MLC's obligations with respect to purchasing vehicles, Your Honor.

THE COURT: I didn't have so much of a problem with the first sentence of 4.1 as I did with the second which is acknowledging what could be regarded by your opponents as a

kind of a detrimental reliance upon a projection but which then goes on in its third sentence to talk about the effect of market demand and the fact that market demand will govern the purchase commitments of the parties.

I can see why the third sentence could be argued by GM to provide a material out when the market demand doesn't warrant continuing doing things but it does -- the second sentence does seem to acknowledge that NUMMI is in reliance on some kind of commitments as making substantial amounts of capexes relying on the projection and that would cause me to believe that there might be some kind of implied duty of good faith that if you have the ability to keep doing business with NUMMI consistent with market demand that there would be some obligation if Toyota does it; I don't think you could contend -- I don't think you could just stop dealing with them on a whim.

MR. ALBANESE: I understand, Your Honor, but the bottom line is that second sentence that you're referring to again is referring to projections, it said "present projections," in 1984 and the parties had a very good relationship for twenty-some odd years. But the sentence that immediately follows it made it very clear that market demand will govern and the parties acknowledge that -- this was a very long relationship and the parties are acknowledging in this provision that market demand could change drastically which it

did twenty-plus years later. And the point is that the contract was specifically drafted to allow for that. To provide that market demand would govern, to have market demand control and impact purchasing obligations. And again, this document doesn't set forth any purchasing obligations. It says that this is the relationship, this is how we're going to work together, this is what we're going to do, market demand will govern your purchasing obligations and you will enter separate sales contracts for the vehicles that you're going to purchase. This document doesn't say you will purchase 100,000 vehicles every year for the next 20 years. It in no way says that or sets up such a relationship.

THE COURT: Keep going, please.

MR. ALBANESE: So, that's our view on the VSA, Your Honor. And again, reading it in its entirety not ignoring any sentences, we think it's crystal clear as to MLC's obligations.

The next document I'll turn to is the 1983 MOU that Your Honor referenced.

THE COURT: Memorandum of Understanding, please?

MR. ALBANESE: Yes, Your Honor; I'm sorry. The 1983 Memorandum of Understanding. And again, this document, the VSA and the shareholders' agreement were executed on the same day, February 21st, 1984. A year prior, the Memorandum of Understanding, the 1983 Memorandum of Understanding, was enacted. And Your Honor referred to it as somewhat of a letter

of intent as "squishy," I think it was the word you used, and we agree with that. I mean this was the parties' intent, and when I say "the parties'", it's Toyota and ML's what's now MLC, getting together and deciding they're going to create this joint venture NUMMI. NUMMI, obviously, wasn't a party to this contract and we say they have a standing issue because this was creating them. They weren't a party to it. But put that aside for now. The point of this agreement, was essentially a letter of intent as to what NUMMI would be, what this joint venture would be. And what we do argue in our papers is that the shareholder agreement a year later is the binding document that creates the obligation that the two shareholders have with respect to NUMMI.

THE COURT: But -- pause, please, Mr. Albanese.

MR. ALBANESE: Sure.

THE COURT: Because the shareholder agreement says in substance, I could probably find the exact words but in substance it says leading into the trumps language you're talking about, to the extent not inconsistent or to the extent inconsistent it supersedes which seemingly says, now, you know having litigated cases of this type back in my first life I well understand that people for business reasons use squishy language for business reasons which would otherwise be inept or even incompetent lawyering otherwise, but in RepraSystem (ph.) terms, RepraSystem, of course, being a Second Circuit decision

under New York law but I don't know if California law would differ in this, "parties can decided to bind themselves or not bind themselves before they enter into the more definitive documentation" and that's their decision and the job of a judge is to determine their intent.

Good lawyers normally say this is a letter of intent and won't be binding until more definitive documentation is entered into. Alternatively, they can say, as was said in the Teachers' Insurance cases, "Upon you signing this, this shall be a binding agreement." This document did neither and it took kind of a hybrid approach and it said this document won't be binding, and this is a paraphrase, until various governmental approvals have been obtained, yada, yada, but the implication is that when they have come in that there is some duties that remain and the fact that a) you didn't argue that there was no agreement at all in your brief coupled with the fact that the shareholders' agreement in 1984 doesn't say forget about the letter of intent it simply says to the extent not inconsistent, it seems to imply that the 1983 Memorandum of Understanding was perceived by the parties as having some contractual significance. Do you think I'm wrong in that regard?

MR. ALBANESE: Well, if I could just respond two ways, Your Honor. First of all, if our papers we argue that this is not a contract with NUMMI. NUMMI didn't exist yet. So, we don't believe that NUMMI can be suing us for a breach of a

Memorandum of Understanding between us and Toyota. So, we do not believe this is a contract with NUMMI. And the shareholders' agreement a year later, Your Honor is absolutely right It has language that says it supersedes this Memorandum of Under -- '83 Memorandum of Understanding to the extent it's inconsistent. But the --

THE COURT: I think I stuck a not in there when I should have but you're correct.

MR. ALBANESE: Right.

THE COURT: It's roughly what it says.

MR. ALBANESE: Correct. And, Your Honor, what NUMMI relies on it for is inconsistent. So, our point is we don't need to get to -- to defer their issues. It's a) not a contract with NUMMI, they can't sue us for breach of it; and b) they're trying to use this -- this Memorandum of Understanding to argue that we're liable -- MLC is liable for its expenses, for its wind-down costs, for its debts at termination yet the Shareholder Agreement, which supersedes it on this point, states that the JV company shall be responsible for the payment of all its own expenses; and it makes clear that the JV is now a separate and distinct entity from its shareholders MLC and Toyota.

So, it's not a contract with NUMMI, they can't sue us for breach of it, and second of all, it's contradicted. The provision for which they rely on the Memorandum of

Understanding is contradicted by the Shareholder Agreement and makes very clear we are not liable for their expenses.

THE COURT: Good time -- good segue for you to talk about their third-party beneficiary point.

MR. ALBANESE: Sure, Your Honor.

THE COURT: Because NUMMI didn't exist, but it sure seemed to me, at the time that the 1983 Memorandum of Understanding was entered into, that people had a pretty good idea that they were going to set up what they referred to as a joint venture.

MR. ALBANESE: Correct, Your Honor.

The parties could have explicitly made NUMMI a third-party beneficiary of this contract, and they did not. There -- the law on third-party beneficiary is clear that a party need to be expressly named as a third-party beneficiary, or it must be clear that the "third-party beneficiary" was intended to be a third-party beneficiary. And there's nothing in the language of this agreement -- there's nothing express to say that this -- that NUMMI would be a third-party beneficiary, and there's nothing, in our view, even implied that says we intended to create a third-party beneficiary status with respect to NUMMI.

And while yes, it's creating NUMMI, the point is that we knew -- the parties knew that they were going to enter into a more definitive Shareholder Agreement, which they did within

a year. And so our view is there was no intent and there's no express language creating the third-party beneficiary status that they're attempting to achieve.

THE COURT: Continue, please.

MR. ALBANESE: Your Honor, let me take the last two agreements that they relied, and then we'll have gone through all four; there are four in total.

We've talked about the Vehicle Supply Agreement, we've discussed the 1983 MOU and we've discussed the Shareholders Agreement, Your Honor, which talks about the separate existing entities.

So, let me just touch on the fourth one then, which is this 2006 MOU. Now, this is created much later than the other documents, because Memorandum of Understanding is '83, Shareholders Agreement is --

THE COURT: Twenty-two years later, I can do the math.

MR. ALBANESE: Twenty-two years later, okay. I won't do the math for you.

So, twenty-two years later they enter into this Memorandum of Understanding because they had updated the vehicles and there were newer models with respect to the Corolla, TMC -- the Toyota Corolla and the GMC Vibe.

Now again, here, Toyota -- rather NUMMI selectively quotes from the agreement, and they argue that this agreement says that both TMC and GMC will make "best efforts to maximize

the production volume during the life in consideration of maintaining the stability and operations at NUMMI". And they use that language to argue that we had an obligation to sustain the viability of NUMMI. But again, they quote this paragraph 1, subparagraph 2, and they don't discuss the next paragraph, paragraph 3, which says -- which reads that "the parties understand that, assuming that 225,000 units of the products are scheduled to be produced in a year, the products will be allocated between TMC and GMC under the following formula" -- and below it lays out a split -- and this is the key language, "where each of TMC and GMC will have a right to, but not an obligation, to purchase the products from NUMMI". And again, while it says we'll use best efforts to maximize production volume, it -- that's qualified and it goes on to state as clearly as it did in the Vehicle Supply Agreement that we will have a right to, but not an obligation to purchase these vehicles.

And then if you go on to paragraph 7 of the 2006 Memorandum of Understanding, which says annual review. That paragraph says "the parties understand that changes in the market condition for the products might make the contents described in this Memorandum of Understanding inconsistent with the continued viability of NUMMI and the profitability of sales on the products; therefore the parties agree that they will annually review all the contents described herein to ensure

that NUMMI will remain viable and that the results from NUMMI's operations continue to be acceptable for TMC and GMC".

Now again, Your Honor, we think that paragraph makes clear that the annual -- the point of the annual review is each year to see where things stand, to see what the purchasing obligations or needs will be going forward and it ends with that the results will be acceptable for TMC and GMC. Again, it's clearly not acceptable for GMC to be purchasing vehicles from NUMMI that have been discontinued at GMC, due to its restructuring with the government.

THE COURT: Well, it's subject to a double entendre, isn't it, Mr. Albanese? That is one interpretation. But TMC, using my parlance, Toyota, and GMC, using my parlance, GM, or General Motors, are shareholders of NUMMI and the language that precedes it to ensure that NUMMI will remain viable, it doesn't say that this arrangement will make sense for either Toyota or GM. This is another example of where each of you guys is relying upon shreds of a larger document, or a larger paragraph, on a 12(b)(6); which I can see a dozen reasons why you may win after trial and half a dozen why you may win on summary judgment but I cannot, for the life of me -- that's overstated, but I have difficulty seeing how you can win on contentions of the character you're making on a 12(b)(6).

MR. ALBANESE: Your Honor, NUMMI is arguing that we were obligated to continue purchasing vehicles from them in

order to keep them viable. This contract, the Vehicle Supply Agreement, say crystal clear -- this is not a paraphrase -- that we do not have a purchasing obligation. We have no obligation -- we have a right to purchase, but not an obligation. That language couldn't be clearer. This paragraph is saying we'll do an annual review, we'll see where things stand; we'll see what we can do to help it remain viable. Earlier it says we'll use best efforts.

But none of that trumps -- none of that creates an obligation to purchase vehicles. And the language says we don't have an obligation. So, we don't think there's any need for factual discovery, we think it'd be a waste of all the parties' time and money, because the contract's clear in that point. I mean, they're saying you had to keep purchasing vehicles from us to keep us viable. But we put in the contracts that we did not have any such purchasing obligations. Trying to use best efforts, trying to do a review to see where things stand and what the market demand was, that's all part of the relationship, but that doesn't create -- I mean, that's all part of the parties' relationship and intent, but that doesn't create an obligation to purchase vehicles.

And the contracts are clear that market demand will govern the ob -- purchasing obligations; and that we don't have purchasing obligations. We have a right, not an obligation, to purchase.

So for the Court to ultimately conclude that we did have -- we had to keep purchasing vehicles from them would be expressly -- would be an express contradiction, in our view, of these plain agreements. And we see no need for discovery we have contracts that are that clear, Your Honor.

Your Honor, those are all -- if you have no more further questions about the four contracts, I'll just turn briefly to their noncontractual claims, the implied covenant of good faith and fair dealing and promissory estoppel.

THE COURT: Um-hum.

MR. ALBANESE: The -- the implied -- and I could sort of do them together -- well, take one at a time. Implied covenant of good faith and fair dealing -- and promissory estoppel, both of these non-contractual claims, we have law which is cited in our papers, and I won't make Your Honor go through it again, but both of those claims, and the law in both of those areas, make it very clear that you can't use those types of claims to get around plain language of a contract. I mean, they're saying that you had an implied covenant of good faith and fair dealing to continue purchasing vehicles from NUMMI to keep it viable. Well, the law is very clear that you can't use the covenant of good faith and fair dealing to rewrite or to contradict the plain terms of a contract.

And the law is clear with respect to promissory estoppel as well, Your Honor, that, first of all, promissory

estoppel, you need a clear promise -- a clear and unambiguous promise to have done something and we never made such a promise to purchase X number of vehicles a year going forward.

THE COURT: Well, that seems, as I understand it, to be a disputed issue of fact.

MR. ALBANESE: Well, Your Honor, sorry.

THE COURT: Forgive me. I do think it's important to focus on whether any promises of the type that your opponents say were made were made before or after the 2006 Memorandum of Understanding was entered into, because if they preceded the 2006 Memorandum of Understanding, then I would have some difficulty seeing how they could trump anything that the 2006 Memorandum of Understanding said. But if they were made after the 2006 Memorandum of Understanding was entered into, don't I have to then consider what they're alleging to be true in terms of what promises were made?

MR. ALBANESE: I don't believe so, Your Honor, because the law is very clear that when an enforceable contract exists, the parties cannot assert a claim for promissory estoppel based on alleged promises that contradict the written contract. So, if -- and that's why, again, we don't think you need to get into the factual analysis.

THE COURT: And the contract you're talking about being the -- which contract?

MR. ALBANESE: The contracts, in our view, Your Honor,

are consistent, whether you're looking at the Vehicle Supply Agreement or the Memorandum of Understanding. Both have the same language, that we have no purchasing obligations and that market demand would govern. So to the extent they're alleging that we made a statement even after the 2006 MOU that we'll purchase vehicles from you -- or, they're saying that, you know, we promise we promise we'll purchase X number of vehicles a year, we dispute that any such promise was made; but even leaving that aside, such a promise would contradict the express language of both contracts, Your Honor. And therefore be unenforceable.

THE COURT: So, let me make sure I understand the issue that's on the table.

You have written contracts with terms that say whatever they say. There is a -- an oral promise, inconsistent with the written contracts, which would in substance be a promise of an amendment, which has not been papered. And your contention is that an oral promise to modify -- or that has -- that is in substance a modification, is unenforceable under the case law?

MR. ALBANESE: Correct, Your Honor, but it's more than a modification; it's contradicted by the plain language of the contract. Again, we don't believe any such promise exists, but even accepting their allegations, the promise explicit -- it's not just an amendment or a modification, it's explicitly

contradicted by the express language of the contract.

And that's what the law says, you can't allege a promise that explicitly contradicts a contract to rewrite a contract.

THE COURT: Um-hum. Okay.

MR. ALBANESE: Your Honor, I'll turn briefly to the few claims that Toyota -- the few claims that Toyota has referenced. And, you know, with respect to the environmental damages claim and the Workers' Compensation claim, Your Honor, again, we -- as we stated in our papers, they don't allege any basis for these claims. I mean, they have not alleged that they have paid any money, that they should be entitled to recover money from NUMMI on, they're completely speculative claims, and they have not sufficiently alleged them to warrant a payment by MLC. I mean these -- on the environmental damages claim, they don't allege any law or statute that would require us -- require NUMMI or us to engage in environmental remediation and a hypothetical, speculative claim that they could be sued for environmental damage somewhere down the road is not a sufficient basis to garner a judgment from MLC.

And the same is true for Workers' Compensation. Now, they said they made a guaranty, but again, they haven't been called upon to pay any money on behalf of NUMMI and they've shown no basis to hold MLC liable.

With respect to the 502 claim, Your Honor, we do think

it would be disallowed -- not 502 claim, with respect to the 502 point -- we do think that to the extent they were to make a claim for contribution -- they have not yet, but we think if they were to make a claim for contribution, we would argue that 502 would apply and that the claim would be disallowed until there was an actual payment or an actual claim that had been settled.

THE COURT: Well, if it isn't a claim for contribution, what they've already asserted, what is it?

MR. ALBANESE: We don't know, Your Honor. I mean, you know, their environmental damages claim, as we said in our papers, we thought was -- you know, they didn't set forth what the law or statute was that it was pursuant to, they didn't set forth what the payment would be made pursuant to, they didn't set forth, you know, what the act was of dumping of hazardous waste or whatever it might be, that created some environmental obligation. We thought their complaint was completely devoid of allegations sufficient to understand the claim, and identify it. To the extent they're saying that they may be held liable to some environmental body for some hazardous waste issue, and that therefore they could seek contribution from us, to the extent they're arguing that, then we do think 502 applies, Your Honor.

THE COURT: Um-hum.

MR. ALBANESE: So if you have no further questions

Your Honor, I'll save any additional points for rebuttal.

THE COURT: Okay.

MR. ALBANESE: Thank you, Your Honor.

THE COURT: Fair enough. Mr. McKane? Do you want to step up?

MR. MCKANE: Thank you, Your Honor.

Good morning again, Your Honor. For the record, Mark McKane, of Kirkland & Ellis, on behalf of NUMMI; and I'm -- I am going to just refer to my client as NUMMI, and I'll try to keep the acronyms at that level.

I understand why the Court is struggling, and I think it is primarily based on the procedural posturing on which you're being asked to address these issues. And with that, it is our position that there may be ambiguities in these contracts, I think you've highlighted some of them, and as a result of that, you cannot grant this motion to dismiss. We need to allow discovery so that we can present to you the course of dealing between the parties, the interaction between the parties, so that you can have a better understanding of how these contracts -- which are interrelated and work together -- you know, are fleshed out -- were fleshed out in practice and that will inform you as to how to address these issues to the extent that MLC, or Motors Liquidation Corp., has gone beyond the scope of what is in the four corners. We think that they cannot convert this into a summary judgment motion at this time

because we haven't been allowed discovery.

And what we're really talking about is a extremely harsh remedy, on a 12(b)(6), where you're being asked to interpret inconsistent provisions of a contract when we are in a situation where a plant is closed, 5,000 people are out of work; indirectly believe the impact on the northern California economy was the loss of 20,000 workers and we're looking at claims for inability to recoup capital expenditures, just that portion of the claim of 150 million dollars.

And so what we're asking for is allow us to go in through the discovery process and prove up our case and then come back to you on a motion for summary judgment or at trial and address these issues again.

Going directly to -- I'll do my best to address the contracts in the manner that Mr. Albanese did, 'cause -- I think that it'll aid the Court. But I think it's important to note that you asked us to flesh out our claim and we did so; in 128 paragraphs and 8 counts, giving very precise details as to which cause -- which contractual language we're relying on. And nonetheless, we're back here today. We think in many ways it's informative to the Court so you see the issues and where we're grappling, but that the end of the day, I think we need to go forward and address this through discovery.

First -- let me start with the Vehicle Supply Agreement, and I'll try to do my best to address our

understanding of how those provisions work in Section 4.1.

We emphasize the "shall purchase" language, the shall -- that GM, General Motors, shall purchase the products on a continuous and stable basis, and we kept repeating that as our mantra; in part because we are facing this allegation that they say they have no obligation to purchase, none whatsoever. And so that's why, you know, we were so -- I apologize, repetitive -- in doing so. But let's walk through all three sentences.

THE COURT: I think you're going to need to, because I had material problems reading your complaint, as to how you took clauses out of context.

MR. MCKANE: All right.

THE COURT: And where when you read the whole sentence from which you took a clause, it at least seemingly, if not clearly, said something very much different.

MR. MCKANE: Well --

THE COURT: But -- all right, let's start with sentence number 1 of 4.1(b), which has the "continuous and stable basis" language in it. It doesn't say, Mr. McKane, the parties promise, or that GM promises, or Toyota promises, to buy vehicles on a continuous and stable basis. It says they're establishing arrangements, which seemingly is not a covenant, but which is describing something else that is going on. So you then, as a judge, got to look at whatever that else is to

determine what the covenant is. Do you think that's an inappropriate way for me to --

MR. MCKANE: I --

THE COURT: -- analyze that language?

MR. MCKANE: I do in part, because I think before you even go to 4.1(b), you have to go up to 4.1(a), which says "these are the principles contained in Section 1, which will apply to the supply and purchase arrangements under this agreement". So I think it's not just that there are supply agreements that are being reference elsewhere, but that this is the -- this is the supply -- a Vehicle Supply Agreement which will govern the production of all model years going forward. And then what happens is as contract operated between the parties and what the course of dealing was is the VSA stayed in effect, and then there were separate Memorandums of Understanding for each of the pro -- of the four-year models that were going to be produced at NUMMI and purchased by GM. And what you have here is, in a commitment that for that model period, GM will purchase the products on a continuous and stable basis and then there's an implementation of that through a series of manuals and agreements.

And this is what we tried to spell out in our complaint, which is how it operated is the three parties, Toyota, General Motors and NUMMI, would get together in a series of annual meeting called the three-party meetings; they

would then set forth for that year what they believed the production level would be for the year. Then, every three months they would meet again and set a thirt -- an eleven-week production schedule, which spelled out per week what they -- what each of the purchasers wanted from NUMMI for that week. That schedule, for each week, would then carry forward. And if unamended by the -- per by the buyers, by GM and others, that schedule -- that number -- would then convert into an individual sale contract.

That's how these contra --this all works together. And what we are saying is how -- and you can read 4.1 and 4.2 together in a way that fits. And what we've alleged is the continuous and stable basis language refers to the fact that for a production year, GM will issue sales contracts under a schedule driven by market demand but that they won't stop issuing the contracts.

And so what we're trying to say to the Court is, they come forward and saying hey, we -- there are no unfilled sales contracts, we have no obligation; what we're saying is market demand impacts the number for that week but for the period of the model -- for that four-year period -- they have a continuing obligation to issue the sales contracts.

THE COURT: Suppose market demand week after week after week was such that it would be idiotic to buy so many vehicles. Are you contending that GM was still obligated to

buy?

MR. MCKANE: What we're saying is -- and we believe the facts show on what we've alleged -- is that there was continuing demand for the Vibe. There was a decline in demand from '07 to '08 and into '09, but that there was continuing demand in excess of 40,000 vehicles. And not only was that important just generally -- that market demand didn't go to zero -- but that, you know, against the allegations that the government forced them to do this, the timing, as we allege in the complaint, is General Motors announces that they're discontinuing the Pontiac line and then thereafter, continues to express interest in producing the Vibe, potentially as a rebranded vehicle under another brand, the GMC brand, and then continues to investigate that issue, and then stops and goes forward.

So there is -- at least we believe the conduct of the parties indicates some obligation, some continuing obligation to produce the Vibe and some market interest to do so.

Now, as to the second point -- the second sentence of 4.1(b), we do believe it's important that there is an acknowledgement that we are making capital expenditures and -- on reliance, on these estimates. And those capital expenditures weren't just in 1984. For each of the production years -- when we introduce a new model, NUMMI creates a new line; makes additional capital expenditures. And that's what

we did in 2006, when in the 2006 Memorandum of Understanding we agreed to produce the Vibe for years 2008 through 2012.

And that's really how the Vehicle Supply Agreement from 1984 interrelates with the Memorandum of Understanding from 2006. The 2006 Memorandum of Understanding spells out what we're going to do specifically for the Vibe. And we made capital expenditures right there as well.

Now, is there detrimental reliance on that projection? There absolutely was. And we have alleged it. We do believe that, you know, in -- you know, the -- we have alleged a breach of good faith and fair dealing. And we believe that we have a reason to say that we -- they breached that good faith and fair dealing through their actions at the wind-down phases. But it's also tethered to express statements of our reliance on their projections for giving capital expenditures. So there is express contractual language on which we are detrimentally relying and on which we have a basis to assert our good faith and fair dealing provisions.

THE COURT: The problem I have, Mr. McKane, because I certainly see the language upon which you can rely, is that most detrimental reliance cases, and I'd have to go back to see whether California tracks my experience with New York law in this area, but most detrimental reliance cases require that you reasonably rely, and you can reasonably rely in many instances but you can't reasonably rely on something if it's contradicted

by something that is elsewhere in the contract.

So, that is one reason why, while I accept the notion that you can rely, whether you could reasonably rely or not, depends on whether some other provision in the contract says you got no business relying on it.

MR. MCKANE: Well, Your Honor, in addition, that I think I -- my reasonable reliance is something I want to have discovery on to be able to prove up what was exchanged between the parties in terms of the development of the Vibe, the commit -- the information that we told them, we are making these capital expenditures and these commitments? And based on your production estimates and your projections going forward? And that also will enable me to prove up the reasonableness of my reliance.

I understand that you may say at the end of the day, sir, you may -- I may question this. But my problem is, not at a motion to dismiss. The reasonableness of my reliance is a factually intensive inquiry here. And I think when you look at the fact that we expressly say we are relying, you may say the amount of your reliance may be in question, but that's going to be -- it might be -- maybe in a motion for summary just -- may -- motion for summary judgment, maybe at trial, but not here. And I think that's -- and our primary position is, you know, given what's at stake, we'd like to live to fight for another day.

Your Honor, I think as to the VSA, it's that the importance as we understand the interrelationship of the agreements. The Vehicle Supply Agreement, the Memorandum -- the, what's called a manual production that we attach, which informs how it works; it's the refusal to issue any additional supply agreement --

THE COURT: Pause please, Mr. McKane. The manual was attached to the Vehicle Supply Agreement, or was incorporated by reference to the Vehicle Supply Agreement?

MR. MCKANE: It is referenced that a manual will be prepared that will govern it. And that is, there's no dispute between the parties, I believe that what I've attached is the manual that was used to apply the vehicle supply agreements.

THE COURT: That was contemplated when the 1984 vehicle supply agreement was signed?

MR. MCKANE: That's correct, Your Honor. And I believe it is -- it's Exhibit G to our complaint. It was effective as of 1986. It's called the "Manual for Allocation of NUMMI Production". And then there was also a purchase procedures manual that was also expressly referenced. That's Exhibit H to the complaint. And that was effective as of December of 1984.

THE COURT: Um-hum.

MR. MCKANE: Let me -- just turning to some of the other issues that you raised. As it relates to the 1983

memorandum of understanding, you've asked some questions as to was this just a letter of intent that wasn't enforced. I think we have to put ourselves back in time. There is a reason why this language was, we're not going to go effective until we're allowed to do so.

THE COURT: Antitrust?

MR. MCKANE: Antitrust, absolutely. And actually, it's referenced in the Toyota papers. There was a serious -- this was -- as revolutionary and important as this was so that GM could get knowhow and understanding as to the Japanese way of making automobiles, there are serious antitrust concerns when the two largest automakers in the world get together and share information. And so there had to be an antitrust review process. There was an antitrust review process. And then that memorandum of understanding went into effect.

I think what gives us all assurances that that is true isn't just the silence of the two parties on that issue. But when you also look to the shareholder agreement, on some of the language that GM tries to rely on when they refer us to Section 10.7, referring to earlier agreements, they express or identify the 1983 memorandum of understanding as one of those earlier agreements. So I mean, there was clearly a -- at least, as of the approval -- the government approval -- the memorandum of understanding was an enforceable agreement.

As to the issue that we assert -- one of our causes of

action under the memorandum of understanding as it relates to the deficit and what will be treated and what will be done at the time of termination, I think what's very important there is that you look at not just the language in the memorandum of understanding that talks about what will happen specifically at the termination, but then, at the shareholder agreement when NUMMI is incorporated and created, it identifies what will happen generally, which is that NUMMI will bear its own expenses, but it also has that carve-out, so that we believe that based on that carve-out of what happen -- not to be inconsistent with earlier agreements, there is no express statement in these shareholder agreements as to what will happen at termination.

And so it's in that exact circumstance that we find ourselves today. And that's why we believe that it's not just the fact that they used expenses as opposed to deficit; it's also there is no express statement as to what will happen at termination in the shareholder agreement. And that's why we look back to the earlier memorandum -- the enforceable memorandum of understanding.

Regarding our third-party beneficiary status on that, I think it's -- first of all, look at the preamble of the memorandum of understanding. The purpose of this agreement is to create the joint venture. The joint venture is NUMMI. NUMMI is an incorporated joint venture. I think that's

important language.

But I also want to highlight for the Court that we identify specific language where there are actions taken by the shareholders for NUMMI's benefit. And we do that -- I think one of the best places where we highlight that language is page 11 of our opposition brief, where we spell out a number of sections that in the memorandum of understanding from '83, that emphasize obligations that General Motors takes on for the benefit of NUMMI. That's the expressed benefit that we believe shows that we are a third-party beneficiary.

GM promises to increase its production -- NUMMI's production, to the maximum extent possible. That it agreed to price the vehicles, "to provide a reasonable profit to NUMMI"; that it would take reasonable -- take necessary measures if NUMMI were endangered; and it would provide guarantees to NUMMI's lenders so that NUMMI could --

THE COURT: I saw that language in your complaint, Mr. McKane. And then I want back and looked at the clauses to find where they were from.

MR. MCKANE: Sure.

THE COURT: I think it was on pages 3, 4, 7 and 10 --

MR. MCKANE: That's right.

THE COURT: -- of the memorandum of understanding. Were you relying upon those solely for the purpose of showing that the joint venture, later NUMMI Corporation, was a third-

party beneficiary, or were you trying to rely on those as establishing covenants to which GM had made a promise? Because I understand how you might make the point on the former. I have more problems when I read the whole language from which you took those snippets --

MR. MCKANE: It is --

THE COURT: -- as establishing covenants.

MR. MCKANE: -- it is the former more than the latter. The only one where we go forward on an affirmative covenant is the one where the best efforts language to maximize production. But that language is not just in the '83 memorandum of understanding, it's also in the '84 shareholder agreement. And it's also in the 2006 memorandum of understanding.

So I have three separate contractual bases on which to assert that same provision. But really I highlighted the provisions on pages 3, 4, 7 and 10 to show that we are a third-party beneficiary. And as to the issue of whether a nonincorporated entity that had not yet been created can have third-party beneficiary status in California, I do urge the Court to look at the Gourmet Lane case that we cited. It's 222 Cal. App. 2d 701. That case spells out exactly that instance where members of an unincorporated association entered into an agreement that association was then incorporated. One of the members failed in its obligation under the agreement and they had not yet been formed as a shareholder incorporated

association, and had third-party beneficiary standing to suit to enforce the member to comply with its obligations. And that's still good law in California.

Your Honor, as to the 2006 memorandum of understanding, this -- the GM position simply falls down to they don't have an obligations because the estimates that are in there are just estimates. They don't have an obligation under those estimates. The 2006 memorandum of understanding is a requirements contract. It's a classic requirements contract. In it, GM acknowledges that NUMMI is the sole manufacturing facility for the Vibe. It states the estimate. We have a -- I think what we have here is a unique -- it's definitely a very special relationship with our owners. It is referenced as an incorporated joint venture. There is the undeniable sharing of information that kind of sets us apart from and makes us different from your standard first-tier supplier.

And what we believe, and under what California law provides in a requirements contract, is that you cannot substantially -- I'm not going to get the exact language right -- but you cannot remove your -- you cannot vary from that estimate down to zero. You can't take it all the way down to zero for a requirements contract when you have that special relationship. There actually is a Tenth Circuit decision on that issue.

THE COURT: Tenth Circuit under California law?

MR. MCKANE: No, it's -- no it's not applying California law. But in that setting when you have a special relationship between an incorporated entity and its member associations in a requirements contract situation where there's an output, the -- it's a case in which the Court found you cannot reduce the requirements down to zero in that special circumstance; especially when you know, not only is there a special relationship, but the entity that's providing the output is making substantial capital investments, based on the estimates being provided at the time. It's in the power purchase agreement context. But it's something I wanted to highlight.

The California language that I was specifically referring to -- I apologize for the confusion -- was the California Commercial Code 23-06, and it's comment 3. That's where in the requirements contract you cannot -- you're bound to purchase quantities "not unreasonably disproportionate to the amount." That's the point I was trying to make under California law, is even if it is an estimate, we believe we have an enforceable requirements contract for an estimate that's not unreasonably disproportionate to the --

THE COURT: I'm having some problems, Mr. McKane, because the way you're articulating the premise, the underlying existence of a requirements contract, is a little different from the one that I had historically grown up with. And I

don't know whether my understanding was too myopic or just didn't capture the concept as it's now understood.

Going back forty years, to when -- or more, when I went to law school, I thought a requirements contract was one that required you to buy everything you needed. Now, this is a little different, at least if I understand your contention, because you're saying that when parties estimate a contemplated level of purchasing, that -- more or less, subject to the nuances you articulated -- that becomes a contractual obligation of some type. Is this a -- this is also a requirements contract under California law?

MR. MCKANE: Yeah. Let me try to bridge the gap, because I don't think it's as large as you think. What we're really saying is, to the extent that they're arguing in any way that the contract -- the 2006 memorandum of understanding -- is unenforceable because there is no set quantity. Part of GM's argument is, we never agreed to buy a set amount. We never agreed to actually make any purchases whatsoever. What we're saying is, the require -- this is a requirements contract in that to the extent that they're -- you need to determine what the quantity was of the purchase to calculate the damages.

We believe we have an enforceable prov -- enforceable agreement that they will purchase amounts. If not 65,000 then an amount that's not unreasonably -- I apologize for the double negative -- not unreasonably disproportionate to that amount.

And so that's why it's really -- it's in a similar setting to the classic requirements contract that you envision.

Our point is, they agreed to purchase four years worth of the Vibe from us, exclusively for their needs. They gave us an estimate. We made massive capital expenditures based on that estimate. And we're saying you can't take that number to zero during those four years. And if you do, and you reject the contract and you breach the contract, then we're entitled to recoup our -- as a reasonable recovery of damages, the amount of the capital expenditures that we made, based on that estimate.

As to our separate contractual assertions that there is an enforceable commitment by General Motors to ensure that NUMMI remained viable, we believe that that language -- it flows through the agreements. We do highlight the preamble language in the 2006 memorandum of understanding. We also highlight section 7 and the language contained there. But again, we agree that it is ambiguous, when you look at section 7 as a whole, that we have a freestanding commitment to take actions to ensure that NUMMI will remain viable; but then you have later language as well.

That's what we think we need discovery to prove out, which is that in addition to these contractual provisions, there are also oral commitments, and of course the dealing along the way, that will show that after the 2006 memorandum of

understanding was entered into, there are continual assurances and commitments made by General Motors that they will purchase at least as many Vibes as necessary to make sure that NUMMI would have stable operations and would remain viable.

THE COURT: Now, the remain viable language comes from the 2006 memorandum of understanding, if I'm not mistaken.

MR. MCKANE: Yes, sir.

THE COURT: You have three causes of action under your viability rubric or heading. It's only your Count III that relies on actual language that says "viability". Am I correct?

MR. MCKANE: It is. We also believe we have enforceable best efforts covenants, that in two other earlier agreements that GM would take best efforts to maximize the production from NUMMI, and that the purpose of that commitment was to ensure that NUMMI would remain viable so that GM could continue to get the knowhow of how to do things the Japanese way. Which, based on statements made by their own executives, as recently as two years ago, generated a billion dollars'-worth of knowhow for their company.

So in our viability rubric, we rely on two best efforts covenants, and then the viability provisions in the 2006 memorandum of understanding.

THE COURT: Um-hum. And the sentence that refers to viability is in section 7 of the 2006 memorandum of understanding: "Therefore the parties agree that they will

annually review all the contents described herein to ensure that NUMMI will remain viable"?

MR. MCKANE: It's also --

THE COURT: "And that the results from NUMMI's operations continue to be acceptable for Toyota and GM"?

MR. MCKANE: -- that is one of the provisions that we rely on. We also rely on the preamble language.

THE COURT: To the 2006 memorandum?

MR. MCKANE: To the 2006 memorandum, where it says, "This memorandum of understanding," and I'll just, "sets forth the basic understanding among," and I'll skip forward, because it's just the three parties, "regarding the production and pricing of new car models to be produced at NUMMI from January of 2008 to December of 2012, collectively 'the products', to help ensure that all parties remain viable."

THE COURT: Um-hum.

MR. MCKANE: And we believe that we have an enforceable viability provision based on that commitment as well.

We're not saying that they had to put our interests ahead of their own. We're not saying they had to help us out and couldn't file for bankruptcy. We're just saying we believe we have an enforceable claim for damages, to the extent that they elect to terminate the contracts.

Your Honor, as to the implied covenant issue, I think

I have emphasized where I believe that we have, based on commitments for capital expenditures, an express provision on which we can rely to assert the good faith and fair dealing. I also would emphasize that we have spelled out very precise factual allegations about GM's conduct, both before and after they announced that they were canceling the Pontiac brand as to why we believe that their negotiations for and their evaluation of continuing the Vibe as another branded GM vehicle and pursuing a Toyota -- rebadged Toyota Tacoma truck, were not in good faith. And we believe that we need discovery to prove those out. We've spun out the allegations, but they are factually intense.

THE COURT: I'm a little confused. It may be outside the record, but I would imagine that there wouldn't be a dispute between you and your opponents on this. I thought I saw a Vibe on the street once. I thought the Vibe is like a compact car.

MR. MCKANE: A Vibe is a compact car. If you've ever seen the Toyota Matrix and the Pontiac Vibe, they're sister vehicles.

THE COURT: But then you made reference to a Toyota truck. I didn't follow that.

MR. MCKANE: So in the negotiations --

THE COURT: Tacoma, was it?

MR. MCKANE: -- it was a Toyota Tacoma. It is a mid-

sized truck. And let me explain what happened.

THE COURT: A pickup type truck?

MR. MCKANE: It is a pickup type truck.

THE COURT: Um-hum.

MR. MCKANE: The Tacoma is another vehicle produced at NUMMI. After GM announced it was discontinuing the Pontiac line, GM, we allege, reaffirmed its commitment to NUMMI and defined alternative ways so that they could continue the NUMMI venture in the NUMMI plant. There were two separate evaluations. One was a rebranded Vibe as a GMC Vibe.

THE COURT: Is it GMC? I thought GMC mainly makes trucks.

MR. MCKANE: Well, I believe that they've made cars in the past. I have a vision --

THE COURT: I see.

MR. MCKANE: -- of a Gremlin in my mind.

THE COURT: But their point is they could have put a Chevy label on it too or some label within the GM family?

MR. MCKANE: That's correct. I mean --

THE COURT: Okay.

MR. MCKANE: -- it didn't -- we weren't specifying -- we, NUMMI, weren't saying to them under what brand they should be offering this vehicle. But they were evaluating a rebranded Vibe.

THE COURT: Um-hum.

MR. MCKANE: In addition to that, they then said we would also consider -- and the term is "rebadged" -- and I apologize, I should have brought water --

THE COURT: It's the one thing you're allowed to drink in this courtroom. If someone wants to give him one, he can.

MR. MCKANE: No, it's all right.

THE COURT: Actually.

MR. MCKANE: Your Honor, may I approach?

THE COURT: Audie, yeah, give it to him. This isn't going to take you very far, but it's better than nothing.

MR. MCKANE: Thank you, sir, for the courtesy. I do appreciate it.

In addition to a rebadged Vibe, they also were evaluating a rebadged Toyota -- a Toyota Tacoma truck that they would offer as well. And it's those negotiations and what was said and the positions took in those negotiations where we believe there was a breach of good faith and fair dealing as well.

But what's important about the fact that there even were these negotiations, after the announcement of the Vibe -- the cancelation of the Pontiac line, is there is either one of two things were going on, as we've alleged. Either there's an independent market interest in the Vibe or there's some belief on the GM side -- because we were within days of filing, and then after filing that this conduct occurs -- that there is an

existing obligation to maintain NUMMI's viability through 2012, and they need to evaluate alternatives other than the Vibe if they're going to cancel out the Vibe. And that's our theory that we've alleged for that provision.

Finally, as it relates to our last count, the promissory estoppel count, I cannot agree with Mr. Albanese's characterization of the law. First, as to our complaint, we have alleged promises that occurred both before the 2006 memorandum of understand and after the 2006 memorandum of understanding; specifically in the annual three-party meetings. They occur generally in December: in December of '05, December of '06, December of '07, December of '08, there was a renewed commitment by General Motors in those meetings, to purchase enough vehicles from NUMMI to maintain its viability through 2012.

That is an express allegation that we've made. And that is the basis for our promissory estoppel. And it is -- I think Mr. Albanese's characterization of California law is wrong. That there can be promises made after a contract that would amend or modify that contract, that are enforceable under promissory estoppel, both before and after. So -- not after. And that's what we're relying on in the last count.

Your Honor, if I could just have a moment to go back through the original questions you posed and the --

THE COURT: Sure.

MR. MCKANE: -- and the issues that you raised?

Your Honor, you at one point said that you had a concern that GM's obligations, in and of itself, could be illusory, that if you take their argument to the extreme that they had no obligation to purchase, then is there an enforceable agreement here at all. I think that's the right read. We support that in terms of like taking it to its logical extreme.

I would also note that GM, at least in the past, has taken the position that these are enforceable agreements in some way; that these are executory agreements. Because at least as it relates to the 1984 vehicle supply agreement, the 2006 memorandum of understanding and the 1984 shareholder agreement as it relates to us, GM went so far as to reject the contracts. So we believe that there's at least some acknowledgement that those are enforceable agreements.

THE COURT: Well, they had a pretty good answer for that in their reply, didn't they, Mr. McKane? They said, in substance, that a) there were obligations other than the obligations upon which you're relying; and b) -- and this is something the debtors of the world encounter all the time -- that they put in disclaimers that said, in substance, to the extent there are any obligations or something, we've got to reject it, that protects their creditor constituency against the much larger burdens that would be associated with having to

assume obligations that could convert pre-petition obligations into post-petition obligations.

MR. MCKANE: Now, I --

THE COURT: And you and your firm -- maybe not you, but your firm has represented its share of debtors over the years, and probably well understands the practical problems that debtors face in this situation.

MR. MCKANE: Your Honor, Mr. Schrock has advised me of that. And so I'm aware that that may be a general protectionary language. But I guess on the first concern, the one that -- the way they responded in their reply wasn't just, hey, we did it out of an abundance of caution; we don't think we had any obligations, but we didn't want to put ourselves in the position exactly you described. They came forward and said we had obligations other than the ones you identified. But they don't identify what those obligations are. And if you read the vehicle supply agreement, it's a vehicle supply agreement. And it's a memorandum of understanding to produce vehicles. If there's no commitment to purchase the vehicles, one wonders what those other obligations are.

So I think our point really, less the abundance of caution, it's -- I think the first half of their response is more telling, because they admit there're some obligations. But for a vehicle supply agreement to not purchase any vehicles, what could there be another obligation to be?

As to -- I'll allow Mr. Soble to address the Toyota claims issue. But coming back to kind of the fundamental principles on which we started. On a 12(b)(6) with much conflicting language and this much need to go beyond the four corners and the ambiguities identified both facial and latent, we believe discovery's necessary, and we ask that we be -- at the end of the hearing we set a schedule and move forward with claims based on the contracts we've asserted, to develop those claims, and if necessary, set a schedule for summary judgment, briefing and trial. Thank you, Your Honor.

THE COURT: Okay, thanks. Gentlemen, we've gone on for almost an hour and a half. Let's take ten minutes, and then I'll hear from Soble and I'll take reply after that.

We're in recess -- actually, let's try to discipline ourselves. Can we try to be back here by 11:15 on that clock? I mean, if you've got to go to the bathroom and there's a line, obviously, I'll understand. But let's try to.

(Recess from 11:08 a.m. until 11:16 a.m.)

THE COURT: Okay. Mr. Soble?

MR. SOBLE: Your Honor, thank you. Again, for the record, Jeff Soble with Foley & Lardner on behalf of Toyota Motor Corporation, which I'll refer to as Toyota, and try and avoid the habits I've built up with our acronyms, as the lawyers are used to using talking to each other.

Your Honor, I want to start by addressing one of the

questions you raised about how these obligations run to Toyota and sort of Toyota's role in that. And I think in doing so, I want to use as a jumping-off point, something -- a factual point that Mr. McKane stated, which is, when we talk about these vehicles, a Pontiac Vibe and a Toyota Matrix are essentially underneath the same vehicle. And here's why.

The vehicles at NUMMI, and in particular the Vibe, were designed by Toyota. In this relationship between the three entities, each entity had one general role -- I would tend to say obligation; I'm sure MLC would disagree with that -- but one major role. NUMMI manufactured the vehicles for GM; Toyota designed the vehicles for GM; and GM purchased the vehicles.

The damages that Toyota is seeking in its adversary proceeding is for research and development costs in designing the Pontiac Vibe. These are research and development costs that were incurred, consistent with the obligations in the vehicle supply agreement and the 2006 memorandum of understanding. And those agreements do refer at various times to model changes and designs by Toyota. In particular in the 2006 memorandum of understanding at paragraph 6, it talks about mid model design changes. Those are design changes that Toyota will undertake, and for which Toyota did expend research and development costs in support of the vehicles that NUMMI would sell to GM.

THE COURT: So if you guys want to get paid for your technology, why don't you have a contract that says that GM's got to pay Toyota for the technology?

MR. SOBLE: Well, we got paid out of the purchase price when GM would buy the vehicles from NUMMI. We recovered our costs for research and development through that transaction.

I wasn't involved -- the contracts go back, obviously, the relationship -- twenty five years. I think the fact, Your Honor, that it took ninety minutes for me on behalf of Toyota to get to speak, speaks to the fact that with 20/20 hindsight, we all probably would have liked the contracts written differently. And I think that the length of this discussion speaks to how difficult this is to do on a 12(b)(6).

But the language you referred to, it's not in there. There are discussions throughout the vehicle supply agreement, just as one example, in paragraph 3.3, that talks about design changes by Toyota. There was no secret that Toyota was designing these vehicles. And there was no secret that --

THE COURT: Mr. Soble, am I mistaken that the deal was structured that Toyota was a stockholder of NUMMI?

MR. SOBLE: A fifty-percent shareholder, yes.

THE COURT: How many other cases are you aware of where stockholders have a right to recover for breaches of contract or its hybrids, promissory estoppel and breaches of

the duty of good faith, for the corporations in which they invest in?

MR. SOBLE: We're not seeking that, Your Honor. We're seeking to recover pursuant to the contracts that we, as an individual party, are parties to. Toyota is a party to the vehicle supply agreement and the 2006 MOU, as an independent entity, as the designer of the vehicles.

Our research and development costs are not duplicative of NUMMI's losses. They are independent costs of Toyota Motor Corporation, not as a shareholder of NUMMI or losses through NUMMI. It was compensation to Toyota for the research and design work that it did for -- as said, all these -- every vehicle that was manufactured by NUMMI was designed by Toyota. And Toyota would obviously incur hundreds of millions of dollars over the years, if not more, in doing that design and development work.

And in this particular instance, the losses are associated with the Pontiac Vibe itself and the research and development of the Pontiac Vibe itself. So as its role as designer, as its own party in a corporation, and as a party to these three contracts -- not through NUMMI, but as a party itself to these three contracts -- as Toyota, that's how Toyota gets here and suffered its losses, proximally caused by GM deciding not to buy any more Vibes.

Your Honor, I want to move on and actually talk a

little bit more about how things worked, because I think that informs the interpretation applying California laws of contract construction to the vehicle supply agreement. And by what I mean is, Your Honor is right. Each side focuses, obviously, on provisions that are most helpful to its own interpretation. And I think we all knew coming here that on our side of the table you'd hear "continuous and stable supply" over and over again, and on GM's you'd hear "no obligation to purchase".

But I think what's important is something that is set forth in paragraphs 30 through 35, including the subparts, of our complaint. And that's the idea that all of this was done not just as a vehicle supply agreement, but with the companion agreements, so that they could manage manufacturing, inventory, production and sales. And as talked about and has been referenced a little bit, there's the manual of allocation, which itself says it's of great importance to keep a smooth production flow for the purpose of maintaining high quality vehicles and facilitating high efficiency of NUMMI's production and in GM's and Toyota's distribution and marketing of vehicles.

The use of individual sales contracts on which GM relies flows from that. The individual sales contracts, as pled in paragraph 34 of our complaint, are created out of a final requirement schedule, a fixed requirement schedule, and preliminary requirement schedules. Pursuant to the purchase

procedures manual, which Mr. McKane referred to, all of this production planning resulted in an individual sales contract.

So read together, consistently, we have three parties agreeing that they will design, manufacture and buy vehicles. GM is going to buy all of their Pontiac Vibes from NUMMI. In fact, in section 1(4) of the 2006 MOU, GM specifically negotiated an acknowledgement by NUMMI and Toyota that all Vibes would be produced at NUMMI, and that GM had no other production capability for that vehicle.

But then the question becomes, how do we manage the supply chain? How do we manage the manufacturing chain? We're not just going to build 65,000 vehicles in a week. So that is where the individual sales contracts in. Here they called them individual sales contracts. In other cases, they could be purchase orders or material releases or electronic invoices. It's a way of all three parties getting together and managing production at NUMMI. That is in context with the idea that everyone would work together; all parties would meet annually; all parties would agree to produce on a continuous and stable basis, to keep NUMMI viable, to do all of those things so that the enterprise could go forward. That is how the individual sales contracts work into the relationship.

This idea that GM only had to buy cars for which it sent an individual sales contract, I think, is shown to be most absurd, to use California law language, if you look at it the

opposite way. Let's say we're at the beginning of 2008, which is the first production year under the 2006 memorandum of understanding, and GM sends an individual sales contract to NUMMI. Under GM's reading of the contract, NUMMI could say in response, no, we're not going to sell you those cars. We've decided we have no obligation to sell you Vibes, so thanks for the property that NUMMI sits on that you put into the deal twenty-five years ago; thanks for the billions of dollars of information and knowledge sharing. We're just not going to sell you those Vibes. We might sell them to you next week or the week after. But we have no obligation to supply you Vibes until we've accepted an individual sales contract. And I cannot believe that in that situation, GM's response would have been, you're right, that's what the contract says.

As for the 2006 memorandum of understanding, one thing we've talked quite a bit about there and with the vehicle supply agreement is market demand. Well, market demand was not zero. In fact, we plead in our complaint that in 2006, 60,000 Vibes were manufactured. In 2007, it was 50,000; and in 2008 it was 70,000. That's paragraph 18 of our complaint.

So in those three years, we have an average of 60,000 vehicles, which actually is materially in line with the 2006 MOU, which had an allocation of 65,000 vehicles for Vibes. So if market demand dictated things, which Mr. Albanese said in his opening remarks today, market demand was not zero. And the

idea that GM could unilaterally decide market demand was zero, is inconsistent, in particular, with the 2006 MOU. The 2006 MOU repeatedly discusses the fact that the parties would work together. Section 1(5), "The parties agree that each fall they will decide the planned production volume of the products at NUMMI for the subsequent three calendar years, and that each spring they will review and modify such planned production volume if appropriate."

So the parties will get together and have this discussion. It goes on, as we've talked about, last sentence, "A final allocation plan will be established that is mutually agreeable to the parties, consistent with the spirit of the joint venture." Well, this situation certainly, is nothing, as we've seen, as mutual agreeable to the parties, nor is it consistent with the spirit of the joint venture, which was to be an ongoing operation to produce vehicles, in particular, Vibes. And that is an independent obligation. It's an obligation to meet and confer with all parties, including Toyota, which we've alleged has been breached.

Paragraph 6, "The parties agree that the expected model life of Vibe and Corolla shall run from January 2008 through December 2012." So again, the parties have memorialized that they expect at least six more years of production. This is entirely inconsistent with the idea that there's no obligation to buy any vehicles at all, going

forward.

It goes on to say that, "Should the need arise to lengthen or shorten the expected model life, the parties will discuss and determine countermeasures," which was not done here.

It goes on, "Expected mid minor model change of Vibe will take place commencing with the 2011 model." Many of the research and development costs that Toyota is seeking to recover in its breach of contract claim arise from research and development related to those mid minor model changes, among others and other research costs.

In the annual review, which is section 7, which we've talked about, again, this is a paragraph that talks about the parties agreeing to do an annual review, what they will agree to coming out of that annual review, with -- going back to 1 section (5), consistent with the spirit of the joint venture, which is ensuring that NUMMI will remain viable.

Those meetings didn't occur. They didn't take place. They did not result in what they were supposed to under the agreements. And these are independent breaches of contract that we have alleged in our complaint.

Also the best-efforts clause in 1(2) of the 2006 memorandum of understanding. We have alleged that GM did not use its best efforts to work towards the continued viability of NUMMI. That's not addressed in any of GM's briefs.

The allegations that we've made concerning discussions about rebranding the Vibe made by us and NUMMI, allegations about discussions about GM trying to gain very favorable terms on rebranding the Tacoma, actually lead me right into the discussion of good faith and fair dealing, because these are all discussion that occurred long after the 2006 memorandum of understanding was signed. And they all have to do with whether GM acted in good faith and in fair dealing in working to continue the viability of NUMMI in using its best efforts in working to rebrand the Vibe, as Your Honor noted, whether it be a GMC Vibe or a Chevy Vibe or a Buick Vibe. Such cross-platform work is certainly not unknown in the auto industry and could have been done, for a vehicle which had been averaging 60,000 in sales the previous three years, which was consistent with the 2006 memorandum of understanding.

Out allegations about the breach of good faith and fair dealing have to do with much more than just GM not purchasing Vibes. They have to do with these misleading statements; with GM's failure to seek alternatives to the Vibe; and with their attempt to extort commercially unreasonable terms to keep NUMMI viable, which refers to the Toyota Tacoma discussions.

All of that -- all of those are allegations which create issues of fact which get us past the 12(b)(6) state and get us into discovery.

THE COURT: What were -- Mr. Soble, what were the statements that you plead were misleading? I mean, that walks and talks like a fraud claim. But I couldn't see the specifics of what you say was said that was misleading. Was it that we intend to keep selling Vibes or -- because -- and are you saying that that intention was false when made? Or was it a promise that wasn't honored, which normally states a claim for either contract or promissory estoppel, depending on how it was articulated, but doesn't state a claim for fraud, or what?

MR. SOBLE: Well, we think there are specific factual examples where GM was not dealing in good faith, that they did not --

THE COURT: That's not the same thing as making a misstatement.

MR. SOBLE: Correct. We don't believe they were misstatements. We have not pled a fraud action; we're not here to argue fraud. We plead in paragraph 45 of our complaint that GM reaffirmed its ongoing obligations to NUMMI in various letters; that on May 11, 2009, GM informed Toyota that it had been working on a plan to repurpose the Pontiac Vibe to a GMC Vibe and was also reviewing additional options to support NUMMI, none of which came to fruition. On May 14th of 2009, GM again stated that it was currently working to develop a replacement for the Vibe and was interested in seeing a new product from NUMMI. All things meant, ostensibly, to help keep

NUMMI viable and going forward and best efforts.

But we don't think that these statements were made in good faith. We don't think we were dealt with fairly. And there are others. I certainly am happy to read through more of them in our complaint. But they generally are in paragraphs 46, 51, 78, 47, in which we don't believe that GM -- we believe that GM breached its obligations of good faith and fair dealing, which are independent obligations under California law.

And we need more details. I have difficulty answering some of these factual questions that you ask, Your Honor, because we haven't had the discovery. We don't have any --

THE COURT: Well, if a statement was made to your guys, you don't need discovery to tell me what they were told.

MR. SOBLE: Correct. And we've pled what we were told. What I can't tell you is what GM was saying internally. I can't tell you what GM was saying to its lenders, what its board was discussing, what its executives were discussing. I have no access to any of that. All of that would be the routine sort of discovery that would occur if this claim goes forward.

THE COURT: Um-hum.

MR. SOBLE: On the promissory estoppel claim, I think that GM in many ways is trying to have its cake and eat it too here. There's no dispute that Toyota expended hundreds of

millions if not billions of dollars in designing cars for two and a half decades, for GM. There's no dispute that Toyota continued to design those cars, including the Vibe, all the way up until the end, when GM pulled out of NUMMI.

Apparently, we were doing that with no promise of any contractual kind, because there's no obligation to purchase anything, and no other promises of any kind. That Toyota was doing that on the off chance that NUMMI might be able to sell Vibes that Toyota had designed for which Toyota would be able to recover its research and development costs.

I think that's just counterintuitive, that these two organizations who sought the antitrust exemption, who formed all of these contracts -- and there are more contracts and agreements than most of us see in most cases -- that all of that would be done with no obligation, contractual or an implied contract. That despite the fact that GM would consult with Toyota on design changes and on design issues with the cars, and that GM knew that Toyota was expending money to do that design work, that there was no promise of any kind to buy any vehicles, that is counterintuitive.

Your Honor, beyond that, on the contracts, I won't talk about the specific provisions. And unless Your Honor has more questions, I think they've been covered very much by Mr. McKane and Mr. Albanese.

THE COURT: Go on to your CERCLA claims or whatever

your environmental claims are, and your Workers' Comp claims.

MR. SOBLE: Your Honor, on the environmental claims, I would note that the California Department of Toxic Substances Control has a claim in this bankruptcy. That Toyota is funding some efforts at environmental remediation. We certainly can plead that more specifically and better in an amended complaint, if allowed. But these are not speculative. There are environmental issues at NUMMI, at least, that the California Department of Toxic Substances Control --

THE COURT: I'm very well familiar with that department, because they were the principal claimant along with the Federal EPA in my Lyondell and Chemtura cases when I dismissed all of the claims by the PRPs in those cases against those debtors. You're not at Kirkland. I somehow suspect Mr. McKane's familiar with what his firm successfully did in that case to make claims of exactly the type you're asserting go away.

MR. SOBLE: I understand, Your Honor. And no, I'm not at Kirkland. And this wasn't briefed or argued by GM. But what I can say, Your Honor, is that there is money being expended. There are costs --

THE COURT: That you've already expended or that you think you're going to expend in the future?

MR. SOBLE: My understanding is that have been expended and that we could plead to add those.

THE COURT: For the limited extent of what your client had expended as a PRP?

MR. SOBLE: I believe so, sir. Yes, Your Honor.

THE COURT: Um-hum. Go on.

MR. SOBLE: As far as the Workers' Compensation, my client has already given a guarantee to the State of California. The guarantee, I believe, exceeded 100 million dollars. And absent that guarantee, NUMMI would have been put into involuntary dissolution. That guarantee does not come without costs. It's not free. There are costs with giving it, associated with carrying it on the books. It is a liability for which Toyota incurs costs.

And as I said, without it, there would have been immediate involuntary dissolution of NUMMI, which would have been in no one's interests. And we have pled that. We think we've pled it adequately for a 12(b)(6) standard. If not, we'll plead more facts related to it.

THE COURT: Um-hum. Go on. Is that it?

MR. SOBLE: That's all I have, Your Honor.

THE COURT: Okay, Mr. Albanese, reply?

MR. ALBANESE: Thank you, Your Honor. Your Honor, I'll be very brief. Both NUMMI and Toyota are selectively quoting from these contracts. And read in their entirety, it is clear that MLC had no obligation to purchase any set number of vehicles. There are two governing contracts on purchasing,

as we said. The vehicle supply agreement and the 2006 memorandum of understanding both say that they have no obligation to purchase any set number. And the vehicle supply agreement makes very clear that you need to enter into an individual sales contract with respect to any actual vehicles that you want to purchase.

And they've not alleging that we breached any sales contract. And they're arguing best efforts. But best efforts does not require MLC to order and purchase vehicles that have been discontinued. This market demand had plummeted. As part of our restructuring the vehicle was discontinued. That's not what best efforts means.

And the only way for this Court to grant them the relief that they are seeking would be to rewrite these contracts and omit the provisions that say there are no purchasing obligations without an individual sales contract. And there's no need for discovery, Your Honor, with contracts that are clear, that don't set forth the obligations that are alleged to have been violated or breached, and in fact, explicitly contradict the obligations that they allege to exist, when the contracts explicitly say they don't have such obligations. There's no need for factual discovery. It would be a waste of the parties' time and money, Your Honor. Thank you.

THE COURT: Okay. I assume that considering the

brevity of Mr. Albenese's comments, there's no need for surreply?

MR. MCKANE: That's correct, sir.

MR. SOBLE: Correct, Your Honor.

THE COURT: Okay. All right. Thank you very much, gentlemen. I'm going to have to take this under submission.

I do want supplemental memoranda on the significance of 502(e) to the Toyota claims for especially environmental remediation, and to the extent, if any, which 502(e) would also apply to the Workers' Comp liability. It's not clear to me that Toyota is actually liable or that GM is liable on those Workers' Comp claims, in which case 502(e) might not be applicable there. But of course, it is relevant on the environmental.

They need not be elaborate. And you're to agree upon a satisfactory supplemental briefing schedule amongst yourselves for how long it takes you to get me those. But I was scratching my head to see why 502(e) doesn't make the environmental claims, to the extent that they're for future expenses, disallowable. And to get my arms around that, I'm going to need it.

The matter is under submission. And after you've agreed upon a stip for a schedule, just paper your deal and submit it to me. If it's reasonable, it's going to be approved. I just want to know when I can expect it.

We're going to right into the appraisal matters now. Thank you very much. Anybody who was here solely on the first matter is free to leave.

(Pause)

MR. LAGEMANN: Good morning, Your Honor. My name is Nick Lagemann, and with me is my partner Steve Bierman --

THE COURT: Just a minute.

MR. LAGEMANN: Sorry.

THE COURT: Over the noise, I couldn't hear you, partly because of your distance from the microphone and partly because of the surrounding noise. Did you say your name was Bierman?

MR. LAGEMANN: No, Nick Lagemann, Your Honor. My partner Mr. Bierman, is on my right.

THE COURT: Oh, you're Mr. Lagemann, the second name on the papers.

MR. BIERMAN: And I'm Mr. Bier -- I'm Steve Bierman, Your Honor.

THE COURT: Okay. Very well, gentlemen.

MR. BIERMAN: Thank you.

THE COURT: And you're at Sidley New York?

MR. LAGEMANN: Yes, sir.

THE COURT: In its New York office?

MR. BIERMAN: Yes.

THE COURT: Okay. And Mr. Steinberg, I know you,

having appeared on other New GM matters.

MR. STEINBERG: I'm with my colleagues, Scott Davidson and Slayton Dabney as well.

THE COURT: Okay. Yes, thank you. All right.

Mr. Lagemann, are you going to be taking the lead on behalf of your clients?

MR. LAGEMANN: Yes, Your Honor.

THE COURT: All right. I thought I was prepared for this matter when I left the courthouse last night, then I found out about a very late reply that was submitted by you, I guess yesterday, electronically, although no copy was sent to chambers.

MR. LAGEMANN: My apologies, Your Honor.

THE COURT: Yeah. My case management order talks about giving me a reasonable time to read reply papers. One of the reasons for it, as the matter ahead of you indicated, is I try to be prepared for these matters beforehand. And when you give me replies like that, it impairs my ability to do that. But with that said, it looked to me, from reading your reply, that you really didn't say much about the timing of the issue; and what you were saying was to the merits of your underlying position, that I should use the appraisal technique that you advocate as contrasted to the one that New GM advocates.

It seems to me, gentlemen, that the real issue for me to decide today isn't so much which of the two appraisal

techniques is most appropriate, but rather whether I should accede to New GM's desire that before I get into the specifics of an appraisal proceeding, I use the approach that New GM recommends, which is deciding the threshold issue of the thing that was addressed in the late reply, which is, does the environment in which you guys are litigating the matter make it more economical for me to decide the philosophical issue/legal issue which you differ on, to facilitate a settlement or a hearing going forward.

And considering a) the fact that this matter has gone on for months; b) that I got a basket full of things on my plate now, including the one that preceded this matter; and c) the fact that it at least seemingly provides for a mechanism for teeing the matter up for either a simpler determination in case no agreement is forthcoming or a settlement otherwise, why New GM's idea for deciding the legal and conceptual underpinnings for the appraisal dispute isn't a good one; under these circumstances, I think I should flip flop the normal order for hearing it.

Well, actually, the motion initiating is the TPC lenders' motion anyway. So I think I should hear from you first, Mr. Langemann, then I'll hear from Mr. Steinberg, and then I'll have the usual opportunity for reply and opportunity for surreply. I also have to say, Mr. Lagemann, that I don't know how significant a role Old GM is going to have in this.

But somehow I suspect that between now and March 8th or whatever the exact day is that Old GM has other matters on its plate that it needs to focus on, like confirmation of its plan.

MR. LAGEMANN: Understood. And Your Honor, again, I do apologize about the late reply. It was my understanding that there was going to be a copy delivered to chambers. But I apologize to the Court for that mistake.

With respect to the questions about scheduling, Your Honor. We believe that the most efficient way to handle this process is to proceed under the schedule that we set forth in our initial motion. We do not believe that New GM has set forth any particular reason why bifurcating or not proceeding with discovery at this point, would expedite this matter to a conclusion. In particular, there is no particular rea -- there is no reason why the parties cannot conduct discovery and brief any particular legal issues heading into a valuation hearing. Which is precisely the type of schedule that we set forth in our initial motion.

The issues, such as they are, we believe, are clear, as we've set forth in our reply brief. But that said, to the extent that the Court thinks that it needs additional briefing on that legal issue or any particular factual issues heading into the hearing, we believe there is more than enough opportunity in the schedule to handle that, and at the same time, move forward in discovery, the same way any other

litigation would proceed.

Your Honor, we think that we can move forward with discovery, which would be narrowly tailored to the specific issues that relate to the appraisal. We think that the discovery can be handled in the short time frame that we've set forth. And then by contrast, Your Honor, we do believe that New GM's proposal would extend and lengthen these proceedings unjustifiably.

By asking this Court to set a separate schedule with briefing first and then the parties proceeding to discovery and to the hearing and proceedings, which they admit in their opposition, are necessary to resolve this dispute, it would merely be lengthening this matter and this dispute to a date which is not set forth in their opposition or their response, and to a point in time which will leave the TPC lenders without resolution of their claim.

Finally, Your Honor, I would like to make clear, obviously, the sale order provides that any party, including the TPC lenders, can initiate these proceedings on twenty-days' notice. So it established a short time frame, a short schedule, to more forward to a valuation proceeding under section 506. We think our motion or the proposed order we submitted, clearly falls within the terms of the sale order and is appropriate. And by contrast, New GM's proposal of separating these proceedings is not something that was

contemplated under the sale order.

THE COURT: Um-hum. All right. Thank you.

MR. LAGEMANN: Thank you.

THE COURT: Mr. Steinberg?

MR. STEINBERG: Your Honor, the reason why we suggested that it made eminent sense to have the Court rule as to what the appropriate standard would be is that when the parties tried to resolve this matter on their own and they exchanged appraisals, that the TPC lenders' appraisal put in two numbers. The fair market value number differed from the New GM appraisal by eleven million dollars. The value in use number differed by thirty-four million dollars.

So we thought that a thirty-four million dollar gap was very difficult to bridge. But if the parties knew that there was an eleven million dollar litigation that was going on when there was an escrow for ninety-one million dollars, and both sides had an incentive to get some of that money back, that they would go back to the negotiating table, and we would never have to come before Your Honor. That was what the parties contemplated doing before.

There was a lengthy preparation of and exchange of appraisals that were done in the fall of last year. There were some settlement discussions. But when you have a fundamental difference as to what the valuation standard should be, then that presented way too large of a gap.

The reason why I'm able to say that there is a difference between fair market value and value in use, and the reason why our papers had definitions, is that we basically extracted them from the appraisal prepared by the TPC lenders. The order that Your Honor signed did use the word "fair market value". What happened in this case was a sale from Old GM to New GM. Fair market value is the valuation standard when you have a sale context.

In the reply, when they cite to the Rash case, they totally miscite anything that's applicable. And we would be prepared to brief that in fairly short order to be able to demonstrate to Your Honor. But simply put, Rash was a Chapter 13 cramdown case where the debtor was retaining the property. And the Supreme Court, when it ultimately got the case, had to decide whether I'm dealing with liquidation value -- what the creditor would get if it got back the equipment and then sold it -- or something more akin to a fair market value. The Rash case uses fair market value concepts. The footnote that cited --

THE COURT: Of course, what you're doing, Mr. Steinberg, just like what Mr. Lagemann is doing, is giving me a preview of what you guys would argue when the issue was teed up for a legal determination.

MR. STEINBERG: I agree with that, Your Honor. And I'm prepared to move on. But what I would like to suggest is

that we could certainly do simultaneous briefing on this issue in two weeks. We each have our one shot to present what the issue is here as to why the order provides what it does and then to be able to present. And if Your Honor decided that issue in the way that we believe it should be decided, it will necessarily narrow the discovery as well too.

There's a different type of discovery that you would take if you had a valuation in use concept versus a fair market value concept. If you're dealing with fair market value, you're dealing with what is the market conditions in June of 2009, which is essentially a battle of the experts as to what the prevailing market conditions then. And both of us have our appraisals. So there's not a long time to ratchet up on this.

But if you had value in use concept, it's a much more fishing expedition, open-ended discovery. And we're going to end up having fights with -- when they serve discovery requests, arguing that that's not the appropriate position anyway.

So we believe that in a very short order, Your Honor would have it in front of you. You would have the benefits of what I was going to say but Your Honor didn't want to address the substance -- that's fine. But we can easily do the substance very, very quickly. We think it's fairly clear cut. And we actually believe that when you deal and narrow this down to an eleven million dollar litigation, parties' attitudes

change in trying to bridge a gap between a bid-and-ask on a valuation of real estate.

Now, there is an underlying issue that may or may not exist in this case. We believe it's less than a one million dollar issue. And we do think that we need to flesh this out to make sure that we're correct on this. You'll see, noted in their papers that there was an allusion that in addition to the real estate appraisals that they may claim to have a lien on some portion of equipment. I think if they would specify what it is that they think that their lien position is, since they never filed a proof of claim, we believe, for that, and what their perfection is -- because we're not sure whether they ever would have perfected it -- we would have the full ambit of what Your Honor would ultimately have to value.

And that, we believe, probably warrants some discovery, if they are alleging something that is way beyond what we think is involved in equipment. And there, I think, the parties can engage in that type of discovery right away. But it's silly to do discovery on the real estate until we know what the valuation standard is. And I think Your Honor, depending on when you rule -- and I know Your Honor has a very busy calendar -- that Your Honor could rule on the issue fairly quickly, because I think it is a fairly clean issue to rule upon. And the legal principles and the order that you signed are fairly explicit in these circumstances.

So, you know, our view is not to just open up the spigot and everybody run around trying to do a whole bunch of different things having discovery skirmishes here. Ours is more focused. And I do think that we have every incentive to try to resolve this matter sooner rather than later. We have just proposed something that we think is more efficient from a litigation expense viewpoint and from a timing viewpoint. And that's why we think our proposal makes sense. Thank you.

THE COURT: Mr. Lagemann?

MR. LAGEMANN: Yes, sir. Your Honor, very briefly. And unless Your Honor wants argument about the particular merits, I think we have set forth --

THE COURT: I assume that you and Mr. Steinberg are going to have continuing disagreements -- difference in perception on that. And I'm just going to assume for the purpose of this analysis that both of your positions are taken in good faith, and it's a classic argument of what cases say.

MR. LAGEMANN: Your Honor, I think that's exactly right.

I would like to address, as far as procedure, though. We do not think that setting forth the -- moving forward the way Mr. Steinberg said will move this any more expeditiously. In fact it's exactly the opposite. As Mr. Steinberg noted, the Court certainly has other things on its plate. We think the parties can move forward on their own, like any two parties in

a litigation, and move forward through discovery to a valuation hearing. And the legal issues can be decided at that point after the parties have gone through the necessary discovery.

In particular, I do note that Mr. Steinberg said that he thought once the Court ruled, if Your Honor ruled in their favor, things could be resolved in short order. We obviously disagree. We think Your Honor would rule in our favor. We think proceeding in the manner in which he requested would then require further delays.

There was an allusion in their response to, to the extent that the Court follows the dictates of Rash and Section 506, as we believe that the Court should, that they will then need more time to go out and commission a new appraisal, until some point in the future which they do not inform us or the Court how long that would take. One thing I would note, Mr. Steinberg has --

THE COURT: Well, pause, Mr. Lagemann. Am I right that sooner or later, the threshold legal issue that separates you and Mr. Steinberg is going to have to be decided by me, unless you guys somehow otherwise make a deal? Let me just ask that first?

MR. LAGEMANN: At some point, Your Honor, yes, there will need to be a decision.

THE COURT: And if it turns out that you're right, New GM has to conduct or solicit or obtain an appraisal on the

legal premises upon which you think I should ultimately be deciding the issue, but that if -- and I express no view on the merits -- I were to favor New GM's view over yours, the need to do that would be obviated?

MR. LAGEMANN: I'm sorry, Your Honor. The question being?

THE COURT: There are two kind of concepts for proceeding with the appraisal: one being on a fair market value, which I gather each of the two sides has already done its homework; the second where you have, but New GM hasn't. If I agree with your legal premise, then New GM has to make what I'll call a category II type of appraisal on value in use as contrasted to the fair market value, on the different philosophy. But if I ultimately agree with New GM, the need to engage in that second kind of appraisal is obviated.

MR. LAGEMANN: Well, Your Honor, I think the answer is yes and no. Yes, to the extent that New GM were correct about the meaning of the sale order and Section 506. Obviously we dispute that. You know, the appraisers have set forth different numbers and there is the gap that Mr. Steinberg talked about. To the extent that the Court follows the dictates as we believe they are, of Section 506 and Rash and its progeny, New GM already has appraisals. New GM already has the ability to, I would expect in short order, starting from today, to institute and get an appraised number under valuing

it under the dictates of Rash.

There is no particular reason -- there is no reason why that could not be done in connection with the proceedings and the schedule as we've set forth in our motion. It's just a matter of New GM going forth and doing it.

We believe that that is -- that should have been done before, as we've noted in our papers. We do not see a reason why the fact it wasn't done before serves as any good reason to deny the TPC lenders moving forward to a claim which was allowed, subject to setting the parameters of it, in the sale order back in June of 2009.

Your Honor, I think that that does not set forward a reason why the parties should not move forward with the particular valuation hearing or the type of valuation hearing that the Court allowed the parties to move forward on, on twenty days' notice, as in the sale order.

Your Honor, just briefly, one other point I would like to touch on. We think that discovery from New GM will be the same under either valuation proceeding. First of all, there is the issue of equipment which Mr. Steinberg noted, and I believe has noted for the Court, should go forward anyway. We obviously disagree about the amount. And in fact, we believe that the equipment and the lien on the equipment can be extremely, potentially, very valuable.

We also think, Your Honor, that discovery relating to

the use of the facilities by GM is precisely the type of information that a potential buyer of the facilities would want, particularly a buyer in the like trade or industry, as required under Rash. Your Honor, that discovery -- and frankly, it is part of what we would be requesting. There are certain pieces of discovery that we received from -- through informal means during the time leading up. We do believe that there is more. But either way, the discovery would be the same under either standard.

THE COURT: Okay. Mr. Steinberg, is there a need for you to rise now? What's the remaining issue that requires a surreply on a matter of this simplicity?

MR. STEINBERG: I always have more to say, Your Honor. But I --

THE COURT: Every litigant does. Every lawyer does.

MR. STEINBERG: But I'm prepared to sit at this point.

THE COURT: Thank you.

MR. SMOLINSKY: Your Honor, Joe Smolinsky for the debtors. I agree with Your Honor that we have very little dog in this fight. I just want to make sure that Your Honor has received our papers and taken them under advisement.

THE COURT: I did. I read them. They came in on time.

MR. SMOLINSKY: Thank you.

THE COURT: Thank you.

(Pause)

THE COURT: All right. Gentlemen, in the contested matter before me, which presents, not an issue on the underlying merits of your positions on the appraisal, either factually or as a matter of law, defining the standards under which the appraisal is to be conducted or the value is to be determined, but rather is a textbook example of how I should apply my 105(d) authority, which gives judges the ability to schedule the matters before them in a manner that puts the most money into the pockets of creditors and is the most efficient, I'm going with New GM's recommendation as to the timing for how these issues should be teed up. And the following are the bases for the exercise of my discretion in this regard.

Obviously, the ultimate issues will require a determination of value of the plant and the equipment, the real and personal property, for the two plants in question. But it's apparent to me that the legal standards under which that question, which is ultimately a mixed question of fact and law, will be determined, raise an important and perhaps critical threshold issue. That threshold issue being whether I determine fair market value with or without consideration of its value for a particular purpose or its value in use is one upon which the parties plainly have a disagreement, and which will determine the ultimate issue.

I'm going to have to decide that issue sooner or later

anyway. I can and will read the various authorities that you have and more likely will file with respect to that. But that is going to be roughly the same time, either way, unless the matter is settled. And that's been at least possible if not clear that that is going to have a material effect on your ability to settle it, if you ever can settle it. And right now it doesn't look like you can settle it.

Mr. Steinberg, on behalf of New GM, may or may not be right in his view of the law. But if he is right, then the associated work on behalf of New GM and in discovery amongst you has at least the probability if not the certainty of being less than it would be if the TPC lenders are right. And I can't give you any prediction as to whether they're going to turn out to be right, but since I'm going to have to spend the time on deciding the legal issue anyway, even the possibility of facilitating a settlement after I've decided that issue, or narrowing the issues later to be determined, is tempting enough, especially in light of the many burdens I have, both in this case and in the other multibillion dollar cases on my watch, it being remembered that Old GM isn't the only one of them. Any opportunity I have to conduct my docket more efficiently and effectively is one that I can't turn down.

I heard Mr. Steinberg volunteer to submit a brief within two weeks and to recommend simultaneous briefs. It seems to me that what you guys should do is not necessarily to

reject Mr. Steinberg's offer, but to agree amongst yourselves as to the best way to time the submissions, and to agree among yourselves as to whether his idea of simultaneous submissions is better for your needs than the more common but not necessarily better seriatim method of submitting briefs.

It also may be appropriate for you to consider -- and I'm certainly not ordering it -- that you do a variant or a hybrid, which is that you have simultaneous submissions, and that you either provide for or reserve the right to submit very short replies, covering anything that you guys didn't think of the first time around. But I think that any agreement of whatever type you guys provide is likely to be approved by me if it's consensual amongst you. And what I want you to do is to prepare a stip or consent order which tees it up for determination on the threshold issue.

I sense that Old GM has no dog in this fight and that at least the briefing of the legal issues will not place any material burdens on Old GM between now and the time of its March 8 confirmation hearing. And Mr. Smolinsky, if I got the date wrong, I apologize. But if it does require anything meaningful from Old GM, you've got to allow enough time for Old GM to do what it needs to do to get its case ready for confirmation.

So come up with a stip or consent order, gentlemen, in accordance with the foregoing. That's the bases for the

exercise of my discretion on this scheduling issue.

Obviously, for the avoidance of doubt, I'm expressing no view whatever on the merits of either the appraisal or the legal premise upon which it's going to be premised. And the fact that I'm leaving out the possibility that New GM might be right in further proceedings might be narrowed or obviated, is premised only on possibility and not in any way, shape or form upon my prediction of the likely outcome.

Not by way of reargument, are there any open issues? Hearing none -- Mr. Lagemann?

MR. LAGEMANN: No, Your Honor.

THE COURT: All right. Very well. All right, we're adjourned. Thank you, very much, folks.

MR. SMOLINSKY: Your Honor, we do have a few uncontested matters.

THE COURT: Oh, yes, I apologize, Mr. Smolinsky.

Anybody who was here on the TPC matter is free to leave. But I'll hear you for whatever it takes on the remainder, Mr. Smolinsky.

MR. SMOLINSKY: Thank you, Your Honor. Joe Smolinsky again. I know it's been a long morning. We can go through this quick. As we only have a handful of hearings between now and confirmation, we're working hard on the claims, as every dollar of claims that's resolved puts more of a distribution in the hands of those holding allowed claims.

Your Honor, we have several omnibus claims motions on the calendar today. As we typically do, to the extent we can resolve those matters, we submit orders indicating the resolution or the defaults, and then adjourn with respect to the continued contested matters.

It's no different today. As normal, we would work with Ms. Blum to make sure that the calendar adequately reflects the adjournments of the matters that are continued, and we can submit orders to Your Honor for consideration.

THE COURT: Okay. So to the extent they've been resolved just submit the orders. And to the extent they're continued, just be sure they don't fall off the radar screen.

MR. SMOLINSKY: We will, Your Honor. Thank you.

THE COURT: All right. Thank you very much. We're adjourned.

(Whereupon these proceedings wee concluded at 12:14 p.m.)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Ellen S. Kolman, certify that the foregoing transcript is a true and accurate record of the proceedings.

Ellen S. Kolman

Digitally signed by Ellen S. Kolman
DN: cn=Ellen S. Kolman, c=US
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Date: February 10, 2011